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In The
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE, United States Navy Commander, Consolidated Naval Brig,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF HISTORIANS AND SCHOLARS OF *EX PARTE QUIRIN* AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Pursuant to Rule 37 of this Court, counsel of record have received timely notice of the intent to file this *amicus curiae* brief and have consented to its filing.

Amici are legal historians and scholars – Michal R. Belknap, A. Christopher Bryant, David J. Danelski, Louis Fisher, Peter Irons, and Pierce O'Donnell – each of whom has studied, written, and published on the Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942). They submit this brief to provide the Court with an historical account of the factual circumstances surrounding the decision in *Quirin*. *Amici* maintain that *Quirin* was an institutional defeat for the Court, a flawed decision that emerged out of a judicial process that is all but unthinkable today. Although the Court would be well within its discretion to repudiate *Quirin*, at a minimum this Court should decline to extend it to the very different facts of this case.

Michal R. Belknap, Professor of Law at California Western School of Law and Adjunct Professor of History at the University of California, San Diego, is a constitutional and legal historian and former

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission to this brief. *Amici* present their personal, not institutional, views.

Military Intelligence officer (1967-1969). He has published numerous scholarly works on legal history and related topics, including four articles examining *Quirin*. One of these, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59 (1980),was the first historical analysis of the case.

A. Christopher Bryant is Professor of Law at the University of Cincinnati, where he is the faculty advisor to the University of Cincinnati chapter of the Federalist Society. Professor Bryant, who has published several scholarly works on constitutional law and legal history, and who worked for all three branches of the federal Government before joining the academy, is the author, along with Carl Tobias, of Quirin *Revisited*, 2003 Wis. L. Rev. 309 and Youngstown *Revisited*, 29 Hastings Const. L.Q. 373 (2002).

David J. Danelski, a lawyer, political scientist, and former Navy JAG officer, is the Mary Lou & George Boone Centennial Professor Emeritus at Stanford University. Professor Danelski has published numerous works on constitutional law, legal history, and the Supreme Court, including *The Saboteurs' Case*, 1996 J. Sup. Ct. Hist. 61, a leading article on *Quirin* for which he received the Hughes-Gossett Award for Historical Excellence from The Supreme Court Historical Society.

Louis Fisher, a political scientist, specializes in constitutional issues at the Law Library of Congress,

after spending 36 years with the Congressional Research Service, also part of the Library of Congress. He testifies frequently on constitutional questions before congressional committees. His books include *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Univ. Press of Kan. 2003) and *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (Univ. Press of Kan. 2005). The latter won the Neustadt Book Award given by the American Political Science Association.

Peter Irons, a practicing attorney, is Professor Emeritus of Political Science and Director Emeritus of the Earl Warren Bill of Rights Project at the University of California, San Diego. Professor Irons is the author of thirteen books on the Supreme Court and constitutional litigation, including *War Powers: How the Imperial Presidency Hijacked the Constitution* (Metro. Books 2005). He has served as lead counsel in the successful efforts to reverse the convictions of Japanese-Americans who challenged the curfew and relocation orders issued during World War II.

Pierce O'Donnell is an author and trial lawyer who has been named one of the "100 Most Influential Lawyers in America" by the *National Law Journal*. A former law clerk for Supreme Court Justice Byron R. White and Ninth Circuit Judge Shirley M. Hufstedler, Mr. O'Donnell has authored the most comprehensive work to date related to the German Saboteurs's Case in his recent book, *In Time of War: Hitler's Terrorist Attack on America* (The New Press 2005).

SUMMARY OF THE ARGUMENT

The Government relies on *Quirin* to support its assertion of power to seize and detain – indefinitely and without criminal charge or trial – a lawful resident of the United States suspected of affiliation with a terrorist organization. The historical consensus developed by *amici* and others demonstrates that *Quirin* cannot, and should not, bear that weight.

As this Court knows, *Quirin* involved eight men directed by the Nazi military in 1942 to invade the United States in disguise and commit acts of war. The facts surrounding the capture and trial of the saboteurs are extraordinary, as are the facts surrounding the Supreme Court decision to authorize the trial. Though six men were put to death in *Quirin*, history reveals that the Court had well-documented concerns about the validity of executive authority to establish the military commission that ordered their executions. The Court's decision in *Quirin* is tainted by conflicts of interest, undue executive influence, and judicial haste. Though the Government seeks to expand it here, *Quirin* is at best a flawed decision that should be limited to its facts. If necessary, this Court would be justified in going further, repudiating *Quirin* in order to reaffirm the centrality of deliberative process and impartial judgment in the rule of law.

ARGUMENT

I. The Historical Circumstances Surrounding *Quirin*

A. Background: the covert invasion, capture and military commission trial

In the summer of 1942, during World War II, eight German saboteurs landed on the beaches of Long Island and Florida. At the time, Nazi forces occupied most of Europe; Russia was reeling under a savage German assault; Nazi tanks were ravaging North Africa; and Great Britain stood precariously alone. Pierce O'Donnell, *In Time of War: Hitler's Terrorist Attack on America* 10, 19 (The New Press 2005). German U-boats patrolling the Atlantic were sinking thousands of tons of shipping, including U.S. and Allied ships, within sight of observers on the shores of the Atlantic Coast and in the Caribbean. *Id.* at 10. Just months earlier, Japan had destroyed Pearl Harbor, and the Japanese forces stretched a vast perimeter of conquest over the Pacific. *Id.* at 10-11, 19. As anxiety about the war took hold of the popular consciousness, America looked alarmingly vulnerable. *Id.* at 19.

Arriving by U-boats in military uniforms and then changing into civilian disguise, the German saboteurs were well funded by the German Government and armed with crates of explosives. Shortly after their arrival, one saboteur, George J. Dasch, had a change of heart and notified the Federal Bureau of Investigation of their arrival and plans. Dasch's

initial attempt to contact the FBI was more or less ignored; the agent made a note of the call but, assuming Dasch was a crank, did not forward it to Washington. *Id.* at 80-81. Dasch then travelled to Washington himself, where he eventually found an FBI agent who believed him. *Id.* at 84, 100-01. With Dasch's assistance, the FBI captured the other seven saboteurs over the next two weeks, before any could complete his mission. *See* Edward S. Corwin, *Total War and the Constitution* 117 (Alfred A. Knopf 1947). The American public embraced the news as a great victory. O'Donnell, *supra*, at 104; David J. Danelski, *The Saboteurs' Case*, 1996 J. Sup. Ct. Hist. 61, 65.[2]

The capture presented President Franklin D. Roosevelt with the question of how to prosecute the saboteurs. The FBI had captured the saboteurs on American soil at a time when the civilian courts were

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[2] In reciting the factual background of *Quirin*, *amici* rely primarily on Professor Danelski's historical account. *See* Danelski, *supra*, at 65-66. The history of *Quirin* has been researched extensively and recounted in numerous works. *See, e.g.*, Corwin, *supra*, at 117-27; Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Univ. Press of Kan. 2003); Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (Univ. Press of Kan. 2005); O'Donnell, *supra*; Michal R. Belknap, *Alarm Bells from the Past: The Troubling History of American Military Commissions*, 28 J. Sup. Ct. Hist. 300 (2003); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433 (2002); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 Mil. L. Rev. 59 (1980).

open and operating – a critical point under the Articles of War and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Nevertheless, his advisors feared that the civil courts would not mete out sufficiently harsh sentences for the saboteurs' acts. *See* Danelski, *supra*, at 65-66. Roosevelt wanted the saboteurs executed, which his advisors believed could be accomplished only by a military trial. *Id.*

There was a second political reason to create a military commission. The Roosevelt Administration initially planned to bring the eight saboteurs to civil trial. But Dasch decided that he would explain in open court how he assisted the Government in locating his seven colleagues. The Administration had convinced the public (and enemy nations) that the FBI had an uncanny ability to discover and apprehend saboteurs. The Administration did not want one of those saboteurs to broadcast the fact that his fellows had been quickly rounded up only because he had betrayed them – and even then only because he had persevered in betraying them despite an initial FBI rebuff. Only a secret military commission would be likely to prevent the disclosure of these uncomfortable facts. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 46, 54.

Within a week, President Roosevelt ordered that the saboteurs be tried before a military commission composed of seven retired generals, and he authorized the commission to impose a penalty of death.

Danelski, *supra*, at 67.[3] The presidential order departed from the Articles of War by permitting the admission of hearsay evidence in the trial, by reducing the number of votes necessary to convict on charges for which the death penalty was authorized, and by sidestepping the required review of certain sentences by the Judge Advocate General. *Id.*; *see* Appointment of Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).[4]

A three week trial of the saboteurs before the military commission began on July 6, 1942. Danelski, *supra*, at 67-68, 71. Attorney General Francis B. Biddle served as chief prosecutor. Colonel Kenneth C. Royall served as chief defense counsel, representing

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[3] Administration officials concluded that existing law authorized prison sentences of no more than two or three years. Fisher, *Nazi Saboteurs on Trial, supra*, at 46-47. For an explanation how the President's order effectively provided an *ex post facto* law, see Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 Geo. Wash. L. Rev. 131, 157 (1943).

[4] Then, as now, certain Executive Branch officials paid scant attention to what were derisively referred to as "technical rights." General George Strong, the intelligence chief reporting to Secretary of War Henry L. Stimson, advised Stimson in a June 28, 1942 memorandum that "the prompt trial and execution" of the saboteurs by a military commission was necessary even though martial law had not been declared and the civil courts were open. He thought the "exigencies of the present situation" required "drastic action without too much deference to technical rights which might be accorded, under the Constitution. . . ." Record Group 165, NARA, Military Intelligence Service.

seven of the saboteurs with co-counsel Colonel Cassius M. Dowell. *Id.* at 67.[5]

The military commission began without a set of written rules. Roosevelt's military order authorized the commission to "make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it." Appointment of Military Commission, 7 Fed. Reg. at 5103. The power to "make such rules" freed the commission from following the procedures enacted by Congress or those that appeared in the *Manual for Courts-Martial*. Rather than working from an established preexisting set of procedural rules known to both sides, the commission issued rules on an ad hoc basis in response to issues arising at trial. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 52-54, 56-58.

B. The Legal Challenge: habeas petitions, the rush to judgment and the executions

On July 21, 1942, in the midst of the military commission trial, Royall announced that he would file federal habeas corpus petitions for the saboteurs to challenge the constitutionality of the military proceedings. *Id.* at 66-68; O'Donnell, *supra*, at 172-81.

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[5] The FBI's informant, George John Dasch, was separately represented by Colonel Carl L. Ristine. Danelski, *supra*, at 67.

On July 23, the prosecution and defense, along with Judge Advocate General Myron C. Cramer, met in person with Justices Owen Roberts and Hugo Black to discuss the Supreme Court's willingness to hear the case. Danelski, *supra*, at 68. On July 27, the Court announced that it would convene a special session to hear the matter on July 29. *Id.* On July 28, the saboteurs filed habeas petitions in the district court. *Ex parte Quirin,* 47 F. Supp. 431, 431 (D.D.C. 1942). The district court summarily – and immediately – denied the petitions that evening. *Id.*

On the next day, July 29 – the day after the district court denied the petitions – the parties submitted more than 180 pages of briefs to the Supreme Court. Danelski, *supra*, at 68. On that very day, the Supreme Court began hearing oral argument, which continued into the next day, July 30. *Id.* at 71.[6]

One day later, at 11:59 a.m. on July 31, the Supreme Court received papers from the D.C. Circuit affirming the district court's summary denial of the petitions. One minute after it received the D.C. Circuit's affirmance, the Court convened and granted certiorari. Gen. Myron C. Cramer, *Military Commissions: Trial of the Eight Saboteurs*, 17 Wash. L. Rev. &

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[6] Among the issues was whether Royall could argue the case in the Supreme Court without the D.C. Circuit having first acted. After some discussion, the Court agreed to let oral argument continue on the condition that Royall would present papers to the D.C. Circuit. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 96-97.

St. B.J. 247, 253 (1942). The Supreme Court immediately denied the habeas petitions in a one-page *per curiam* order and announced that it would later file a full opinion addressing the merits. *See Quirin*, 317 U.S. at 1, 5-6; *see also id.* at 18-19 (reproducing the *per curiam* opinion in an unnumbered footnote).[7]

After the Supreme Court denied habeas, the military trial quickly resumed and concluded. Danelski, *supra*, at 71. The parties gave closing arguments the next day, on August 1. Two days later, the Commission found all defendants guilty of all charges, recommending death for all eight. *Id.* at 71. The Commission forwarded the transcript to President Roosevelt for his review. *Id.* at 71-72. The White House announced its approval of the Commission's decision on August 8, upholding six of the death sentences, commuting Dasch's sentence to 30 years and another cooperative saboteur's sentence to life imprisonment. *Id.* at 72. The Government began the executions at noon that same day and electrocuted the six saboteurs in a little over an hour. *Id.*; O'Donnell, *supra*, at 248-49.

Nearly three months would pass before the Supreme Court issued an opinion explaining its reasons for finding military jurisdiction proper and

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[7] The order summarily decided that (i) the President was authorized to order the trial before a military commission; (ii) the commission was lawfully constituted; and (iii) the saboteurs were held in lawful custody for trial before the commission. *Quirin*, 317 U.S. at 18-19.

thereby denying habeas corpus relief. *See Quirin*, 317 U.S. at 1 (full opinion filed October 29, 1942). Along the way, serious misgivings about the decision arose among the Justices, but undue Executive Branch influence and the Court's need to justify a *fait accompli* left little room to change course.

II. The Opinion in *Quirin* is Undermined by Historical Findings of Conflicts of Interest, Undue Executive Influence, and a Rush to Judgment.

Justices Scalia and Stevens had reason to describe *Quirin* as "not this Court's finest hour." *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia & Stevens, JJ., dissenting). As Justice Stevens noted two terms ago, "*Quirin* represents the high-water mark of military power. . . ." *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (Stevens, J., concurring) (explaining that "no more robust model of executive power exists"). In the more than 60 years since the Court issued *Quirin*, legal historians have uncovered a wealth of information that casts grave doubt on whether the water should ever have reached that high.

A. The deliberative defects

The Justices' deliberations after the electrocutions – like those before the electrocutions – were affected by President Roosevelt's credible threats to undermine the authority of the Court. As the *New*

York Daily News reported at the time, the significance of the question before the Court in *Quirin* was that "it pit[] the authority of the Supreme Court directly against that of the President." Fred Pasley, *Spies Challenge Jurisdiction of Court Chosen by Roosevelt*, N.Y. Daily News, (undated) (cited in Jack Betts, *The Trials of War*, Carolina Alumni Rev., Mar.-Apr. 2002, at 32, 37). President Roosevelt made it clear to the Court that he would assert the supremacy of his authority regardless of the Court's position. O'Donnell, *supra*, at 213.

The Roosevelt Administration had made plain that the President expected unanimous approval of the commissions. President Roosevelt was determined to block any judicial review of the Nazi saboteurs. He told Attorney General Biddle: "I won't give them up. . . . I won't hand them over to any United States marshal armed with a writ of habeas corpus. Understand?" Francis Biddle, *In Brief Authority* 331 (Doubleday 1962). In chambers, immediately before hearing argument in *Quirin*, Justice Roberts reported to his colleagues that Attorney General Biddle had privately expressed concerns that Roosevelt would execute the Germans no matter what the Court did. *Id.*; Danelski, *supra*, at 69. Justice Roberts added that he believed Roosevelt intended to have all eight men shot even if the Court did not acknowledge his authority. O'Donnell, *supra*, at 213. The threat was plain: if the Court did not give the President the power he wanted, then he would take it anyway, causing undeniable damage to the authority and

sovereignty of the Court. The point was not lost on Chief Justice Stone, who replied, "That would be a dreadful thing." *Id.*; Danelski, *supra*, at 69.

The Executive Branch was aided in its efforts by Justice Frankfurter, who had advised Secretary of War Henry L. Stimson to try the saboteurs by military commission. Fisher, *Nazi Saboteurs on Trial*, *supra*, at 95. Indeed, he had secretly advised the Administration about how to structure the military commission in anticipation of a Supreme Court challenge. Danelski, *supra*, at 66 (citing Diary of Henry L. Stimson (June 29, 1942) (on file with Microfilm, Library of Congress)). Despite these *ex parte* conversations with the Administration, and the resulting conflict arising out of the very case before the Court, Frankfurter did not recuse himself. Instead, he tried to spread his bias to the rest of the Court.

Chief Justice Stone assigned himself the opinion, Danelski, *supra*, at 72, and in the three months that followed, the Justices struggled to find common ground. *See, e.g.*, Michal R. Belknap, *Frankfurter and the Nazi Saboteurs,* 1982 Sup. Ct. Hist. Soc'y Y.B. 66, 68. The Chief Justice described his effort to secure a unanimous opinion as "a mortification of the flesh." *See* Alpheus T. Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 Harv. L. Rev. 806, 820-21 (1956) (citing Letter from Harlan Fiske Stone to Roger Nelson (Sept. 20, 1942), Harlan Fiske Stone Papers, Box 69 (on file with Manuscript Room, Library of Congress)).

Seeking to persuade reluctant Justices to rally around the result, Frankfurter wrote to his colleagues the "F.F. Soliloquy," a fictional dialogue between Justice Frankfurter and the habeas petitioners. "F.F. Soliloquy," Hugo LaFayette Black Papers 1883-1973, Box 269 (on file with the Manuscript Division, Library of Congress), *reprinted in* Belknap, *Frankfurter and the Nazi Saboteurs*, *supra*, at 66. The F.F. Soliloquy revealed a Justice openly hostile to the accused and "manifestly unwilling to afford them any procedural safeguards." *See* Belknap, *Frankfurter and the Nazi Saboteurs*, *supra*, at 66.

Frankfurter labeled the Germans "damned scoundrels" who had a "helluvacheek" filing the petitions, admonishing them: "You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime." *Id.* at 69. According to Justice Frankfurter, the petitioners were "just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion." *Id.* After concluding that "for you there are no procedural rights," "F.F." ends his dialogue by telling the saboteurs, "you will remain in your present company and be damned." *Id.* at 70.

The F.F. Soliloquy shows that Justice Frankfurter "cared far more that these enemies be punished quickly than that they be tried fairly." *Id.* at 66. As well, it showed that his support for the Roosevelt

war effort trumped all constitutional concerns. *See* Fisher, *Nazi Saboteurs on Trial*, *supra,* at 120. Rather than communicate substantive constitutional arguments to his fellow Justices, Justice Frankfurter launched "imprecations to his fellow Justices not to become involved in sticky constitutional issues that might generate divisiveness amongst themselves." G. Edward White, *Felix Frankfurter's "Soliloquy" in* Ex parte Quirin: *Nazi Sabotage and Constitutional Conundrums*, 5 Green Bag 2d 423, 435 (2002). This Soliloquy is all the more remarkable because Justice Frankfurter directed it at six Germans who had been electrocuted months earlier.

The Court's haste in issuing its order before drafting a full decision vexed several Justices. In 1953, when the Justices debated whether to meet in summer session to hear the espionage case of Julius and Ethel Rosenberg, one Justice recalled how the Court a decade earlier had met during the summer to hear the Nazi saboteur case. It was further suggested that, as in *Quirin*, the Court could announce its judgment shortly after oral argument and file a full opinion later, with legal reasoning. Justice Robert Jackson rebuffed the proposal, and Frankfurter himself added that "'the *Quirin* experience was not a happy precedent.'" Fisher, *Nazi Saboteurs on Trial*, *supra*, at 134 (quoting "Memorandum Re: *Rosenberg v. United States*, Nos. 111 and 687, October Term 1952," at 8 (June 4, 1953), Frankfurter Papers,

Harvard Law School, Paige Box, Part I, Reel 70, LC).[8] In a 1962 interview, Justice Douglas recounted, "Our experience with [*Quirin*] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble." Danelski, *supra*, at 80 (citing Transcription of Interviews of William O. Douglas, by Walter F. Murphy, at 204-05 (on file with Seeley G. Mudd Manuscript Library, Princeton Univ.)).

Several years after *Quirin* was decided, John P. Frank, who had been Justice Black's law clerk in the summer of 1942, wrote that *Quirin* was an "instance[] of haste [where] the Court ha[d] allowed itself to be stampeded" by the Executive Branch. John P. Frank, *Marble Palace* 249 (Alfred A. Knopf 1958). "[I]f the judges are to run a court of law and not a butcher shop," Frank wrote, then "the reasons for killing a man should be expressed before he is dead; otherwise the proceedings are purely military and not for [the] courts at all." *Id.* at 250.

Alpheus T. Mason, author of a biography of Chief Justice Stone, explained how difficult it was for Stone

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[8] The unusual summer session is one reason for which the Court has cited *Quirin* as a limited precedent confined to the most extraordinary of circumstances. *See Cousins v. Wigoda*, 409 U.S. 1201, 1204 (1972) (Rehnquist, J.) (denying an application for a stay following oral argument, and observing that *Quirin* was one of only four cases heard in special session).

to draft the full opinion. In an effort to justify the already-executed death sentences, Stone confided in his clerk that he believed that "'the President's order probably conflicts with the Articles of War.'" Mason, *supra*, at 822 (quoting Letter from Harlan Fiske Stone to Bennett Boskey (undated), Harlan Fiske Stone Papers, *supra*). He wavered in his conviction that the Court needed to justify what had already been done, considering holding in favor of the petitioners. O'Donnell, *supra*, at 255. The Chief Justice recognized the weakness of the Government's arguments, remarking, "I hope the military is better equipped to fight the war than it is to fight its legal battles." *Id.* In drafting the full opinion, Chief Justice Stone was keenly aware that the judiciary was "in danger of becoming part of an executive juggernaut." Mason, *supra*, at 831.

But ultimately, the Chief Justice thought he had no choice but to uphold the jurisdiction of the military commissions. If the Court were to confess the error of its hasty order, it "'would leave the present Court in the unenviable position of having stood by and allowed six men to go to their death.'" Fisher, *Nazi Saboteurs on Trial*, *supra*, at 111-12 (quoting Chief Justice Harlan Fiske Stone, "Memorandum [to the Court] re Saboteur Cases," at 2 (Sept. 25, 1942), Harlan Fiske Stone Papers, *supra*). And the Chief Justice concluded that any such admission by the

Court, mere months after the saboteurs' executions, would come at too high an institutional cost.[9]

B. The substance that deliberative defects brushed aside

Quirin ultimately rested on its construction of Congressional action in enacting the Articles of War, which were the precursor to the Uniform Code of Military Justice (UCMJ). As history has since shown, the severe defects in the Court's deliberative process caused the Justices to ignore their serious concerns about the proper construction of those Articles. *Amici* do not aim here to suggest a proper construction of those Articles (which in any event have been superseded by the UCMJ and are not applicable in this case), but merely to show briefly that the case's deliberative defects led the Justices to set aside their serious substantive misgivings, both before and after the rendering of the full opinion.

On September 10, 1942, while working on a draft of the full opinion, Chief Justice Stone told Justice Frankfurter that he found it "'very difficult to

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[9] *See* XII William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953* 320 (Cambridge Univ. Press 2006) ("Chief Justice Stone provided an accurate and fair evaluation of his handiwork: 'About all I can say for what I have done is that I think it will present to the Court all tenable and pseudo-tenable bases for decision.'" (quoting Stone to Frankfurter (Sept. 16, 1942)).

support the Government's construction of the articles [of war].'" Fisher, *Nazi Saboteurs on Trial*, *supra*, at 110 (quoting Letter from Stone to Frankfurter (Sept. 10, 1942), Frankfurter Papers, *supra*). In particular, the Justices were unable to agree on the construction of Articles 46 and 50½, a dilemma that Stone found "'embarrassing'" because six of the petitioners had been executed and it was "'too late to raise the question in their behalf.'" *Id.* at 112 (quoting Chief Justice Harlan Fiske Stone, "Memorandum [to the Court] re Saboteur Cases," *supra*, at 1). Frankfurter wrote with confidence that he had "not a shadow of doubt" that Roosevelt "did *not* comply with Article 46 *et seq.*" of the Articles of War. *Id.* at 117 (emphasis added). But, at least at that time, the non-compliance with the Articles of War did not matter to him.

Likewise, the *Quirin* Court's construction of Article 15 proved unsettling after the opinion's release. Shortly after the Court issued the full opinion in October 1942, Frankfurter took the extraordinary step of commissioning an analysis of the opinion by a military justice expert, Frederick Bernays Wiener. Fisher, *Military Tribunals and Presidential Power*, *supra*, at 121. In three successive analyses, Wiener found serious constitutional problems with the Court's decision. *Id.* Notably, Weiner criticized the Court for creating "'a good deal of confusion as to the proper scope of the Articles of War insofar as they relate to military commissions.'" *Id.* (quoting "Observations of Ex parte Quirin," at 1, signed "F.B.W." Frankfurter Papers). "Weaknesses in the decision

flowed 'in large measure' from the administration's disregard for 'almost every precedent in the books' when it established the military tribunal." *Id.* (quoting "Observations of Ex parte Quirin," *supra*).

Wiener's strongest criticism concerned *Quirin*'s interpretation of Article 15, which provided:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Act of June 4, 1920, ch. 227, 41 Stat. 759, 790.

Quirin, of course, found that Congress's purpose in enacting Article 15 was to incorporate by reference the rules of the law of war. *Quirin*, 317 U.S. at 27-29. Yet the laws of war did not stretch so far as to encompass military commissions convened in the United States, away from the field of war. As Wiener noted in a letter to Frankfurter, in which he quoted Brigadier General Enoch H. Crowder's testimony to Congress, the purpose of Article 15 was merely to "'save[] to these war courts [including military commissions] the jurisdiction they now have and make[] it a concurrent jurisdiction with courts-martial, so that the *military commander in the field* in time of war will be at liberty to employ either form of court that happens

to be convenient.'" *See* Fisher, *Nazi Saboteurs on Trial*, *supra*, at 133 (quoting Letter from Wiener to Frankfurter at 1-2 (Aug. 1, 1943), Frankfurter Papers) (emphasis added); *see also* Danelski, *supra*, at 73, 79.[10] The *Quirin* court's interpretation of Article 15 – its conferral of military jurisdiction in certain proscribed circumstances off the battlefield – remains controversial. *See Hamdan*, 548 U.S. at 593 (noting that the Court then had "no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions").

Compelled to justify the desired outcome, Chief Justice Stone's clerks unsurprisingly found "little authority" to support the desired outcome. A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 Wis. L. Rev. 309, 323 (citing Letter from Harlan Fiske Stone to Bennett Boskey (Aug. 9, 1942), Harlan Fiske Stone Papers, *supra*); *see also* Mason, *supra*, at 820-21. His biographer offered this blunt assessment of the Justices' actions in *Quirin*: "Their

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[10] Wiener remained critical of *Quirin* for the rest of his life. In discussing *In re Yamashita*, 327 U.S. 1 (1946), he noted in 1987 that General MacArthur "had abandoned the rules of evidence" in *Yamashita* "because in the *Quirin* case everything hinged on the hearsay statements of co-conspirators," and the Executive Branch wished to avoid the evidentiary rule that such statements "couldn't be used against other conspirators." Frederick Bernays Wiener, Oral History 92-93 (1987) (on file at the library of The Judge Advocates General's School, Charlottsville, VA).

own involvement in the trial through their decision in the July hearing practically compelled them to cover up or excuse the President's departures from customary practice." Mason, *supra*, at 826. But having given permission for the saboteurs' executions, the Court felt that it had no practical option other than to uphold the exercise of military jurisdiction. *Id.* at 830.

III. *Quirin* Should Be Limited to Its Facts or Repudiated.

In *Boumediene*, this Court described *Quirin*, along with *Yamashita*, as "habeas cases involving enemy aliens tried for war crimes." *Boumediene v. Bush*, 128 S. Ct. 2229, 2270-71 (2008). While noting that significant criticism had been leveled, this Court concluded that it "need not revisit these cases" because they were distinguishable on their facts. *Id.* at 2271. So too here. *Quirin* need not – and should not – be extended to cover the very different facts of this case. But if this Court determines that it must conclude that *Quirin* is applicable to these facts, then *Quirin*'s core principles will have unraveled, and it should be revisited and squarely repudiated.

A. *Quirin* cannot be extended to cover this case.

The opinion in *Quirin* circumscribed domestic military jurisdiction while permitting its exercise, after the fact, on the particular facts of the Nazi saboteurs who had been electrocuted. *Quirin*, 317

U.S. at 45-46. The petitioners in *Quirin* did not contest the fact that they were affiliated with the armed forces of an enemy nation, or that they could be detained as combatants under the law of war. *Id.* at 21-22, 37-38. The *Quirin* court held that petitioners who, armed and in uniform, had crossed enemy lines and entered the United States on behalf of an enemy nation could be tried by military commission for violating the laws of war. *Id.* at 21-22, 31 (noting that soldiers landed by German submarines and came ashore in German Marine Infantry uniforms carrying explosives); *see also id.* at 22 n.1 (noting that the Eastern Seaboard had been designated a military defense zone, with military forces deployed along it to stop enemy soldiers from landing).

For *Quirin* to be applicable here, it would have to expand radically in several directions at once. First, it would have to provide authority for the detention without criminal charge or trial of those who are suspected of supporting a terrorist organization, rather than an enemy nation. Second, it would have to provide authority for the detention without criminal charge or trial of those who deny, rather than admit, their alleged status. Third, it would have to cover a petitioner who is indisputably not an enemy alien. Fourth, it would have to cover a person who has not been charged with a war crime.

Expanding *Quirin* in all four directions at once would rend it beyond repair. The *Quirin* court limited its holding to admitted uniformed soldiers of a foreign Government who snuck behind enemy lines during a

declared war in order to commit war crimes. Such soldiers unquestionably qualified as combatants within long established law-of-war principles. *Id.* at 30-31 & n.7 (citing, *inter alia*, the Hague Convention as evidence of "universal agreement and practice" on this matter). But inferring a detention power far beyond those circumstances, as the Government does here, causes the "longstanding law-of-war principles" on which *Quirin* rested to "unravel." *See Hamdi*, 542 U.S. at 521; *see also al-Marri v. Wright*, 487 F.3d 160, 195 (4th Cir. 2007) ("[T]he indefinite military detention of a civilian like al-Marri would shred those understandings apart."), *rev'd en banc sub nom. al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008).

B. If *Quirin* were applicable, it would properly be revisited and repudiated.

As Parts I and II make plain, improper influences adversely affected the decision-making process in *Quirin*: the state of war and a then-dominating Nazi army; the perceived threat of vulnerability of the United States to invasion from both the east and the west; the desire to support President Roosevelt in time of war; conflicts of interest among Court members; the Administration's threat to eviscerate the Court's authority; and the Court's face-saving rationalization in struggling to validate its hasty *per curiam* order in an opinion written after the executions occurred. Independently and collectively, these influences tarnish *Quirin*'s legitimacy – discrediting

an opinion that today forms the backbone of the Government's argument.[11]

The history of *Quirin* may well be "a fascinating tale of intrigue, betrayal, and propaganda . . . [of] questions of judicial disqualification; a rush to judgment; [and] an agonizing effort to justify a *fait accompli*. . . ." Danelski, *supra*, at 61. But it provides no foundation for the rule of law.[12] If at the time the

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[11] Aside from the conspicuous shortcomings in the manner in which *Quirin* was decided, the full opinion itself has been roundly criticized. The "most pernicious legacy of *Ex parte Quirin*" is the "Court's cavalier dismissal of *Ex parte Milligan*." O'Donnell, *supra*, at 262; *see also Hamdi*, 542 U.S. at 572 n.4 (Scalia, J., dissenting) ("The plurality's assertion that *Quirin* somehow 'clarifies' *Milligan* . . . is simply false. . . . [T]he *Quirin* Court propounded a mistaken understanding of *Milligan*. . . ."). *Milligan* remains a "seminal case," as this Court noted in *Hamdan*. *See Hamdan*, 548 U.S. at 591. Nothing suggests that the deliberative process in *Milligan* suffered from the severe flaws that it did in *Quirin*.

[12] To the contrary, the opinion has since been forcefully denounced. *See, e.g.*, Corwin, *supra*, at 118 (describing the decision as "little more than a ceremonious detour to a predetermined goal"); Fisher, *Military Tribunals and Presidential Power*, *supra*, at 124 ("The saboteur case of 1942 represented an unwise and ill-conceived concentration of power in the executive branch."); O'Donnell, *supra*, at 262 (describing the decision as "more [of] a political act than a judicial decision"); XII Wiecek, *supra*, at 320 ("As a specimen of judicial craft, it was transparently and disingenuously results-oriented, based on logic-chopping distinctions and evasive of real constitutional problems."); Belknap, *The Supreme Court Goes to War*, *supra*, at 87 (describing *Quirin* as a "dubious decision"); Bryant & Tobias, *supra*, at 364 (concluding that *Quirin* should be "understood as a relic of an unduly narrow and long-abandoned approach to

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Supreme Court's legitimacy required (as Chief Justice Stone then thought) that the Court justify what had already been done, then it is at least equally true sixty years later that contemporary knowledge of the circumstances of *Quirin* compels the opposite conclusion: that the Court's legitimacy would be enhanced, not undermined, by disavowing the decision.

Stare decisis is not "an inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *see also Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court. . . .").[13]

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federal habeas corpus jurisdiction"); Maj. Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three – Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 108-09 (1998) (describing how with respect to the right to a trial by jury, "courts continue to blindly rely on . . . *Quirin* and [its] poorly reasoned conclusion, which was reached upon facts of no moment today"); White, *supra*, at 438 (describing how Justice Frankfurter's soliloquy "revealed himself to be a judge passionately engaged in promoting a particular outcome in a case, and strongly desirous of providing a cursory justification for that outcome"); Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 170 (2004) (describing *Quirin* as "a paradoxical and controversial case through and through").

[13] Little law has been built atop *Quirin*. Its most prominent progeny is *Yamashita*. As *Boumediene* noted, *Yamashita* too has been "sharply criticized by Members of this Court." *Boumediene*, 128 S. Ct. at 2271 (citing *Hamdan*, 548 U.S., at

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> "The jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself."

Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (quoting Peter L. Szanton, *Stare Decisis; A Dissenting View*, 10 Hastings L.J. 394, 397 (1959)). In short, where a decision "was not correct

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617 and *Yamashita*, 327 U.S. at 41–81 (Rutledge, J., dissenting)). *Yamashita* has also been the subject of widespread criticism by scholars. General Yamashita's five judges were officers on General Douglas MacArthur's staff with no legal experience; none of the officers appointed to defend him had any criminal defense experience. *See* Harlington Wood, Jr., *"Real Judges,"* 58 N.Y.U. Ann. Surv. Am. L. 259, 272-73 (2001) ("In General Yamashita's case, there had not even been the pretense of a fair and impartial trial in those military circumstances."). Moreover, the legal standard applied against General Yamashita was that he "must have [] known" about atrocities committed by his troops in the Philippines, even though there was no evidence that he knew of the atrocities or had in any way ordered them. Fisher, *Military Tribunals and Presidential Power*, *supra*, at 146, 148-49. Years later, when U.S. officers were charged with atrocities in Vietnam, they were tried under a different and more lenient standard. They had to have "actual knowledge." *Id.* at 153. *Quirin* has also been cited for assessing the Court's jurisdiction where a matter has not been addressed by the Court of Appeals, *see, e.g.*, *Hohn v. United States*, 524 U.S. 236, 246 (1998), and for evaluating whether a special session of the Court is appropriate for hearing such matters, *Cousins*, 409 U.S. at 1204.

when it was decided, . . . [i]t ought not to remain binding precedent." *Lawrence*, 539 U.S. at 578.

Where, as here, the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," a case should be repudiated. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992). As Justice Brandeis noted, in "cases involving constitutional issues," the Court, "must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, 'depend altogether on the force of the reasoning by which it is supported.'" *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412-13 (1932) (Brandeis, J., dissenting) (quoting *The Passenger Cases,* 48 U.S. (7 How.) 283, 470 (1849)), *majority decision overruled by Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938).

Were *Quirin* to be expanded to cover the petitioner in this case, this Court's decision would entrench that case's errors more deeply in our law. Justice Jackson noted as much in his dissent from *Korematsu*. When the Court rationalizes "[a] military order, however unconstitutional" and validates the principle behind that order, Jackson warned, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds the principle more deeply in our law and thinking and expands it to new purposes." *Korematsu*

v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

As one historian put it:

> The frenzied pace of the proceeding and the Germans' execution without a full opinion gave the appearance that the Supreme Court was stampeded by Roosevelt. The justices heard argument without the benefit of reading the briefs ahead of time [and] decided the case in less than a day with virtually no collective deliberation (much less reflection). . . . In opting to draft an after-the-fact opinion that consciously sought to do the least damage to the judiciary at the expense of justice, Stone injudiciously gave short shrift to several issues on which the German saboteurs had the more persuasive legal argument. In the end, the Court felt it had no choice but to uphold the military tribunal's jurisdiction, casting itself as little more than a "private on sentry duty accosting a commanding general without his pass."

O'Donnell, *supra*, at 264 (quoting Mason, *supra*, at 830).

CONCLUSION

Quirin is a flawed decision that this Court should confine to its historical moment and facts. If it cannot be so confined, *Quirin* should be reconsidered and repudiated. *Amici* take no position on the ultimate resolution of the petition.

Respectfully submitted,

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